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THE STATE ACTION CONUNDRUM[1] REEXAMINED: A NEW APPROACH AND ITS APPLICATION TO THE CONSTITUTIONALITY OF CREDITOR SELF-HELP REMEDIES

I. INTRODUCTION

A. *The Development of Constitutional Challenge to Creditor Remedies*

Since 1969 when the Supreme Court decided in *Sniadach v. Family Finance Corp.*[2] that a state's wage garnishment procedures were subject to the due process requirements of prior notice and an opportunity to be heard, the general area of creditor remedies has come under increasing constitutional scrutiny.[3] While various lower courts[4] debated the applicability of *Sniadach* to the remedy of statutory replevin for default under conditional sales contracts,[5] the issue was temporarily settled by the Court's decision in *Fuentes v. Shevin.*[6] In that case the Florida and Pennsylvania statutory replevin procedures were found constitutionally defective because they allowed issuance of a writ authorizing repossession by a sheriff pursuant to an ex parte proceeding.[7] This holding was consider-

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1. This characterization reflects the sentiment expressed by Professor Black: "Nothing . . . has at all shown why or how, or to whom, the concept (of state action) has been in any degree 'helpful': it has been presented, true to life, as a string of conundrums, not of solutions." Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14,* 81 HARV. L. REV. 69, 92 (1967) [hereinafter cited as Black].

2. 395 U.S. 337 (1969).

3. *See* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment,* 46 So. CAL. L. REV. 1003, 1005-08 (1973) [hereinafter cited as Burke & Reber].

4. *Id.* at 1006 nn. 3 & 4.

5. The conditional sale contract as an independent security device has been nominally abolished under the Code. U.C.C. § 9-102(2). (All references in this article are to the 1972 version of the Uniform Commercial Code unless otherwise indicated). The provisions regarding purchase money security interests, U.C.C. § 9-107; relating to automatic perfection, U.C.C. § 9-302(1)(d); and priority, U.C.C. § 9-312(4), closely parallel prior law regarding conditional sales of consumer goods. *See, e.g.,* Uniform Conditional Sales Act § 5 (1918). *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 754-57 (1972).

6. 407 U.S. 67 (1972). The decision was by a vote of 4-3, Justices Powell and Rehnquist not participating.

7. The Court recognized that ex parte repossession may be warranted under some circumstances. The following were listed as examples: (1) foreclosure of a tax lien, Phillips v. Commissioner, 283 U.S. 589 (1931); (2) national emergency, United States

ably modified in *Mitchell v. W.T. Grant Co.*[8] where the Louisiana sequestration procedure was upheld against due process attack, notwithstanding its ex parte nature, because of the presence of some additional safeguards of arguable significance.[9] Despite its apparent dissatisfaction with the full reach of its holding in *Fuentes,* the Court was nevertheless willing to expand its condemnation of prejudgment wage garnishment in *Sniadach* to cover garnishment of business bank accounts in *North Georgia Finishing v. Di-Chem.*[10]

The creditor remedies discussed thus far share the characteristic of direct, albeit perfunctory, involvement of the judicial process. While, as has been seen, debtor success in challenging these remedies has been by no means uniform, the difficulty encountered by the debtor in such instances pales in comparison with the struggle encountered when challenging creditor

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v. Pfitsch, 256 U.S. 547 (1921); Stoehr v. Wallace, 255 U.S. 239 (1921); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921); (3) preventing a bank failure, Fahey v. Mallonee, 332 U.S. 245 (1947); (4) taking misbranded drugs and impure foods off the market, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); North Am. Storage Co. v. Chicago, 211 U.S. 306 (1908); and (5) to obtain quasi-in-rem jurisdiction over a nonresident, Ownbey v. Morgan, 256 U.S. 94 (1921), Fuentes v. Shevin, 407 U.S. 67, 90, 91 n.23, 92 nn. 24-28 (1972). *See* White, *The Abolition of Self-Help Repossession; The Poor Pay Even More,* 1973 WIS. L. REV. 503, 510-11 [hereinafter cited as White].

When the Court was squarely faced with the question of the constitutionality of ex parte seizure to secure quasi-in-rem jurisdiction, it sidestepped the issue by announcing that quasi-in-rem jurisdiction would no longer be recognized in the absence of sufficient grounds for personal jurisdiction. Shaffer v. Heitner, 433 U.S. 186 (1977). This reinforces the thesis that the Court, badly split after *Fuentes,* will avoid addressing the issue of the constitutionality of creditor remedies whenever it perceives a basis for doing so. This thesis goes a long way toward explaining the resurrection of the state action requirement since it provides just such a basis.

8. 416 U.S. 600 (1974).

9. The Louisiana sequestration procedure involved the following elements which were not present in one or both of the Florida and Pennsylvania statutory replevin procedures invalidated in *Fuentes*: (1) The sequestration order had to be signed by a judge, rather than a mere clerk; (2) The application for the order had to contain factual allegations upon which the creditor's claim to possession was based, rather than mere conclusions of law; (3) The debtor could regain possession either by posting a bond or by demonstrating at an immediately held adversary hearing that the creditor's claim was unjustified; and (4) If the debtor regained possession by means of the adversary hearing he would be, entitled to damages. *Id. See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 548 n.28 (1978) [hereinafter cited as TRIBE]. Louisiana does appear to be genuinely more solicitous of debtors' rights; for example, it does not recognize the right of self-help repossession. *See* LA. REV. STAT. ANN. §§ 9:4562-4564, 13:3851 (West 1951) (Louisiana has not adopted the U.C.C.). *See* White, *supra* note 7, at 516 n.46.

10. 419 U.S. 601 (1975).

remedies involving the feature of self-help.[11] It is here that the phantom of the state-action requirement,[12] which has thus far proven an insurmountable obstacle, rears its ugly head. In a case not often noted for its connection with the area of creditor remedies, *Jackson v. Metropolitan Edison Co.*,[13] the Court found that the termination of electric services by a heavily regulated public utility because of a delinquency in the customer's account did not constitute state action and was therefore not subject to fourteenth amendment due process scrutiny. More closely relevant to the inquiry at hand, the Court in *Flagg Bros., Inc. v. Brooks*[14] upheld the procedure for the private foreclosure of a warehouseman's lien embodied in U.C.C. § 7-210 against due process attack as a result of a finding of insufficient state action.

If contemporary state action doctrine were at all predictable, if it in any way provided a conceptual framework yielding consistent results, the issue could be taken as having been settled by *Flagg*. As it is, self-help repossession under U.C.C. § 9-503 could possibly be distinguished on at least two grounds: (1) section 9-503 authorizes repossession by the secured party,[15]

11. U.C.C. § 9-503 is a prime example. It provides in pertinent part: "[A] secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace . . . ." This in turn is a codification of the creditor's common-law right, *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 119 & n.27 (4th ed. 1971) [hereinafter cited as PROSSER], a point which was considered significant in Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330 (9th Cir.), *cert. denied*, 419 U.S. 1006 (1974), the leading case dealing specifically with U.C.C. § 9-503. *See* Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1, 49-53 [hereinafter cited as Thompson].

12. U.S. CONST. amend. XIV, § 1 reads in pertinent part as follows: "No *State* shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added). The limitation of the reach of the amendment to state action was first enunciated in the Civil Rights Cases, 109 U.S. 3 (1883).

13. 419 U.S. 345 (1974).

14. 436 U.S. 149 (1978).

15. Repossession is peculiarly a police function. Normally, when a secured creditor wishes to repossess the collateral upon the debtor's default, he does not do so himself, but hires a private repossessor. *See* White, *supra* note 7, at 521. The private repossessor is in turn licensed by the state and is required to give the police notice of the repossession. *See* Thompson, *supra* note 11, at 57. This closely parallels the situation presented by Williams v. United States, 341 U.S. 97 (1951), where state action was found in the coercive conduct of an investigation by a private detective who was in effect deputized by the police. *But see* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 163 n.14 (1978). Justice

whereas section 7-210 only authorizes the warehouseman to sell property already within his possessson;[16] (2) the warehouseman in *Flagg* did not seek a deficiency judgment[17] so the question of the constitutionality of the judicial enforcement[18] of self-help remedies has not as yet been presented to the Court. One can only bemoan the condition of a constitutional doctrine which requires the drawing of such insubstantial distinctions, but such is the condition of contemporary state action doctrine and that is the subject of the next section of this comment.

B. The Development of State Action Doctrine

The purpose of this section is not to present an exhaustive litany of the Court's work in the state action area; that has been ably done by others.[19] The intention is rather to examine, out of the many categories of state action cases,[20] the two "heads of a hydra"[21] which were directly involved in deciding the *Flagg* case, the authorization and encouragement cases,[22] and the public function cases.[23] This will be done with a view toward pointing out the inconsistencies and the total lack of doctrinal guidance which characterize contemporary state action doctrine in these areas.

Rehnquist's suggestion there that "this Court has never considered the private exercise of traditional police functions" is clearly wrong in light of *Williams*. *Id.*

16. A warehouseman's lien, enforced pursuant to U.C.C. § 7-210, is limited to "goods covered by a warehouse receipt or on the proceeds thereof *in his possession* . . . ." U.C.C. § 7-209(1) (emphasis added).

17. Although he clearly could have under U.C.C. § 7-210(7), which preserves to a warehouseman all rights which a creditor has against his debtor.

18. In Shelley v. Kraemer, 334 U.S. 1 (1948), the Court clearly distinguished between voluntary compliance with a racially discriminatory restrictive covenant, which would be constitutionally innocuous, and the judicial enforcement thereof, which would be impermissible state action. Thus it could be argued that a private disposition pursuant to U.C.C. § 7-210 is free from constitutional scrutiny only so long as the courts are not involved. When court ratification of the private conduct is sought in an action for a deficiency judgment, the *Shelley* situation is presented.

19. *See, e.g.*, Burke & Reber, *supra* note 3, at 1041-1109.

20. The categories developed by Burke & Reber include the following: (1) direct action initiated and carried out by a state officer or agent; (2) concerted action by the state and a private party; (3) private parties performing a "public function"; (4) private action compelled by the state; (5) action by a private party regulated by the state; (6) private action authorized or encouraged by state law. *Id.* This section will deal with categories (3) and (6).

21. Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 5 (1961) [hereinafter cited as Van Alstyne & Karst].

22. 436 U.S. at 164-66.

23. *Id.* at 157-64.

1. The Authorization and Encouragement Cases

The Court has been repeatedly presented with the situation where private conduct has been challenged on constitutional grounds because of some level of approval lent to such conduct by either the state or federal government.[24] The level of approval necessary to trigger constitutional scrutiny has been difficult to identify, and different results have been reached on strikingly similar facts.

In *Public Utilities Commission v. Pollak*,[25] for example, the Court found the necessary level of approval in the dismissal of an investigation of the challenged conduct. The municipal transport company for the District of Columbia contracted with a local radio station for the broadcast of radio programs on its streetcars. This was challenged on first amendment grounds based upon a monopolization of speech on the streetcars, and on fifth amendment due process grounds based upon an invasion of the riders' privacy. The transport company was heavily regulated by Congress through the Public Utilities Commission and constituted a virtual monopoly of public transportation. In finding governmental action,[26] the Court specifically relied upon the fact that an investigation was ordered which was dismissed after a formal hearing.[27] The constitutional challenges were, however, rejected on the merits.

Burton v. Wilmington Parking Authority[28] presented a different level of state involvement which was nevertheless found insufficient to invoke the fourteenth amendment. The operator of a restaurant and a parking lot on land leased from the state practiced racial discrimination in serving customers. This action was attributed to the State of Delaware, either on the theory that a Delaware statute authorized the racial discrimination,[29] or on the theory that the state was in a position to prevent the discrimination.[30] That either ground is problematic was eloquently pointed out by Justice Harlan in dissent.[31]

24. The state action requirement, insofar as it is applicable to state governments, is equally applicable to the federal government. *See* TRIBE, *supra* note 9, at 1147 n.1.

25. 343 U.S. 451 (1952).

26. *Id.* at 462.

27. *Id.*

28. 365 U.S. 715 (1961).

29. *Id.* at 726-27.

30. *Id.* at 725.

31. *Id.* at 728-30.

Griffin v. Maryland[32] found impermissible the enforcement by a sheriff of a private policy of racial discrimination formulated by an owner of a public amusement park. This was the one case in a series of sit-in cases which the Court was forced to decide on constitutional grounds.[33] The Court noted that the policy of discrimination originated in a private decision but apparently considered the state action line to have been passed when the private actor asked for police assistance in enforcing his decision regarding the use of his property.

Reitman v. Mulkey[34] was concerned with California's Proposition 14 which became article I, section 26 of the California Constitution. That referendum effectively repealed existing fair housing legislation[35] and constitutionalized the right to discriminate in the provision of housing.[36] In a series of plurality opinions, the consensus was that the state's approval of racial discrimination had reached the level of constitutional violation.

Evans v. Newton[37] dealt with a testamentary trust estabished in 1911 by Senator Bacon's will to maintain a public park for the use of whites only. The enforcement of the terms of the trust by the Georgia Supreme Court together with the participation by the municipality in the upkeep of the park were found to constitute impermissible state action. It is not clear whether it was the function of running a public park in a discriminatory manner which disturbed the Court, or whether it was the Georgia court's approval of the terms of a discriminatory trust which triggered the scrutiny. It is clear, though, that the decision to discriminate arose independently in the mind of Senator Bacon.

Thus far we have a wide panoply of circumstances in which the government was found to have crossed the bounds of per-

32. 378 U.S. 130 (1964).

33. *See* Burke & Reber, *supra* note 3, at 1030-32.

34. 387 U.S. 369 (1967).

35. *See* Burke & Reber, *supra* note 3, at 1074 n.268.

36. Propositon 14 provided in pertinent part:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Id. at 1074.

37. 382 U.S. 296 (1966).

missible neutrality. We have (1) failure to proscribe an activity as a result of an investigation; (2) failure to police the choice of customers served by a lessee; (3) assistance to the owner of private property in excluding those whose presence is not wanted; (4) granting of a right heretofore not recognized; and (5) failure to overturn the provisions of a will. The next round of cases should cast considerable doubt on the continued viability of finding state action in any of these circumstances.

Moose Lodge v. Irvis[38] found no state action in the granting of a liquor license to a private club which practiced racial discrimination. In this instance the activity of selling liquor was heavily regulated by the state, and the grant of a license presupposed an examination and approval of the practices of the licensee. Yet, as the Court pointed out in a footnote,[39] so long as the state had not undertaken a formal investigation of the activity in question, it had not impermissibly approved it. The Court did find state action in an administrative regulation which mandated that each licensee adhere to its constitution and bylaws, which in the case of *Moose Lodge* required discrimination. Even this holding was probably eroded in *Jackson v. Metropolitan Edison Co.*[40] There the Court held that the unilateral termination of electrical services by a public utility did not constitute state action despite the fact that the termination practice was contained in a tariff which was required to be submitted to the Public Utilities Commission of the state for approval, and the fact that the utility was affirmatively required to abide by its tariff. The Court rejected the argument that such approval constituted state action by observing that "[t]his provision (for termination) has appeared in Metropolitan's previously filed tariffs for many years and has never been the subject of a hearing or other scrutiny by the Commission."[41]

These developments suggest, first of all, that if *Public Utilities Commission v. Pollak*[42] has not been effectively overruled there must be some distinction of constitutional dimensions between approving a practice after holding a formal hearing and approving the same practice without holding such a hear-

38. 407 U.S. 163 (1972).
39. *Id.* at 175 n.3.
40. 419 U.S. 345 (1974).
41. *Id.* at 354.
42. 343 U.S. 451 (1952).

ing. Similarly, if *Burton v. Wilmington Parking Authority*[43] is still viable, there must be a constitutional distinction between lessees and licensees. Such propositions may make fine minor premises in a legal syllogism, but it is the search for the major premise that provides the frustration.

If *Griffin v. Maryland*[44] stands for the proposition that the decision as to the use to which private property will be put comes under constitutional scrutiny whenever the police are asked to enforce it, it cannot survive the Court's decisions in *Lloyd Corp., Inc. v. Tanner*[45] and *Hudgens v. NLRB.*[46] Since those decisions will be considered in the next section it is enough for now to observe that the decisions taken together hold that the owner of a shopping center can enforce the criminal trespass laws to exclude those engaging in speech to which he objects and that he can require enforcement assistance from the state without being affected by the first amendment.

Reitman v. Mulkey[47] is facially inconsistent with *James v. Valtierra*[48] at least from a state action standpoint. *Valtierra* involved article XXXIV of the California Constitution which required majority approval at a community election before low-income housing could be built in that community. It thus constitutionalized the right to discriminate against the poor in the way that article I, section 26 constitutionalized the right to discriminate on the basis of race. The asserted distinction between the two cases is based upon a holding that wealth is not a suspect classification. Yet, if the *Reitman* premise is accepted, the granting of the right to discriminate against the poor involves the state directly in that discrimination. It is clear from a number of cases[49] that the state can no more arbitrarily discriminate against the poor than it can arbitrarily discriminate against anyone. This proposition does not require a holding that wealth is a suspect classification. *Valtierra,* then, must be bottomed upon a holding that the state, by

43. 365 U.S. 715 (1961).
44. 378 U.S. 130 (1964).
45. 407 U.S. 551 (1972).
46. 424 U.S. 507 (1976).
47. 387 U.S. 369 (1967).
48. 402 U.S. 137 (1971).
49. *E.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969), Edwards v. California, 314 U.S. 160 (1941) (right to interstate travel); Douglas v. California, 372 U.S. 353 (1963), Griffin v. Illinois, 351 U.S. 12 (1956) (access to criminal justice system).

enacting article XXXIV, is not directly involved in the decision of the members of a community to exclude low-income housing. As such, it undercuts the premise upon which *Reitman* was based, namely, that by constitutionalizing the right to discriminate the state directly participates in the resulting discrimination.

Evans v. Newton[50] was followed on its heels by *Evans v. Abney*.[51] The same provision in Senator Bacon's 1911 will was before the Court again, but this time the Georgia Supreme Court had applied the *cy pres* doctrine[52] to the charitable trust in order to terminate it. The Georgia Court concluded, quite correctly in all probability, that Senator Bacon would rather have no park at all than one open to blacks, effectively closing the park to both races. The same question was presented to the Court as had been presented in the *Newton* case, namely, whether the Georgia Court's authorization of Senator Bacon's posthumous discriminatory activity constituted impermissible state action. Inexplicably, this time the Court answered no. To be sure, the closing of the park affected both races and this factor would later be considered significant in *Palmer v. Thompson*[53] where the Court sustained a municipal closing of public swimming pools which had previously been ordered integrated. But the Court based its decision in *Palmer* on a refusal to inquire into the motives of the municipality for undertaking a facially neutral act. The closing of the park in *Abney* was not even facially neutral, as it came about only as a result of giving effect to Senator Bacon's discriminatory purpose. If the holding in *Newton* were followed, this would be the equivalent of the state's acting for an avowedly discriminatory purpose, which would clearly be a violation of the constitution.

Thus, the authorization and encouragement cases in the state action area are a road leading nowhere. Whether the public function cases provide any more guidance is a question to be taken up in the next section.

2. The Public Function Cases

The central inquiry in this area is whether a private party

50. 382 U.S. 296 (1966).

51. 396 U.S. 435 (1970).

52. *See* G.G. BOGERT & G.T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS, 525-31 (5th ed. 1973).

53. 403 U.S. 217 (1971).

is performing a function so closely associated with the state that he should be held to the same standards in performing it as the state. This area is characterized by a considerable degree of vacillation, so that lines drawn in one case are subject to express obliteration in the next.

Even with respect to the political process, an area which would appear to be about as public as any, the Court had some initial difficulty in drawing the line between state action and private action. The earliest cases involved a white primary election of one sort or another. *Nixon v. Herndon*[54] arose when a black was denied the right to vote in the Democratic primary by the express terms of a Texas statute. The Court had no trouble finding a violation of the fifteenth amendment. The state attempted to circumvent that holding by delegating to the executive committee of the Democratic Party the power to prescribe voter qualifications. In *Nixon v. Condon*[55] the same plaintiff challenged the practice and impelled the Court to render the ruse ineffective.

The march toward expanding the public function category was temporarily halted, though, when Texas repealed its statutes controlling party voter qualifications, leaving the matter to be decided by the party. In *Grovey v. Townsend*[56] the denial of the right of a black to vote under this system was found not to violate the fifteenth amendment. The state was held to be insufficiently involved for the state action requirement to be satisfied.[57]

In *Smith v. Allwright,*[58] however, the Court began to look not at the degree of state involvement but at the nature of the function being performed. In holding that the right to vote in the Texas Democratic primary was secured by the fifteenth amendment regardless of who attempted to deny it, the Court expressly overruled *Grovey.* After emphasizing the role played by the Democratic primary in Texas politics,[59] the Court concluded that because of this role it was a state function that was being performed.[60] This holding was extended in *Terry v.*

54. 273 U.S. 536 (1927).
55. 286 U.S. 73 (1932).
56. 295 U.S. 45 (1935).
57. *Id.* at 55.
58. 321 U.S. 649 (1944).
59. *Id.* at 664-65.
60. *Id.* at 660.

Adams[61] to cover the right to vote in a preprimary election run by a county political organization which dominated county politics.[62] Although the organization was a private one, its control over county politics made the holding of its elections a public function.

It thus appears that, despite some early hesitancy, the Court has been willing to commit itself to the notion that elections are a public function and must be run in accordance with the Constitution no matter who is running them.[63] It is in other areas that the search for doctrinal guidance leaves one empty-handed. The first amendment cases provide an excellent example.

In *Marsh v. Alabama*[64] a company town owner enforced the state trespass laws against a Jehovah's Witness who persisted in distributing religious literature on the town's streets. In reversing the trespass conviction, the Court held that the religious liberty and free speech rights of the pamphleteer were secure against interference by the town's owner. The Court emphasized the functional equivalence of the town to a municipality despite its private ownership.[65] In rather broad language the Court seemed to give a great deal of content to its public equivalence holding: "The more an owner for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[66] This language was relied upon in *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[67] for a holding that labor picketing of a store within a shopping center was protected by the first amendment from interference by the shopping center owner. The functional equivalence of the shopping center to the business district in *Marsh* was stressed.[68] Up to this point, shopping centers, with their virtually unlimited clientele and their wide open spaces were within the public domain regardless of who owned them.

But this expansive notion did not long survive. It was first

61. 345 U.S. 461 (1953).
62. *Id.* at 463.
63. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1978).
64. 326 U.S. 501 (1946).
65. *Id.* at 502-03.
66. *Id.* at 506.
67. 391 U.S. 308 (1968).
68. *Id.* at 318.

cut back in *Lloyd Corp. Ltd. v. Tanner*[69] where antiwar demonstrators were successfully required to conduct their activity off a shopping center premises. The Court made the distinction between first amendment activity which was related to the use to which the property was put and such activity not so related,[70] as if that had any bearing on either the nature of first amendment rights or the public nature of the property. In that case, Justice Marshall wrote a prophetic dissenting opinion in which he declared that *Logan Valley* could not survive *Tanner*.[71] His prophecy was fulfilled in *Hudgens v. NLRB*[72] in which the Court, in another labor picketing context, expressly overruled *Logan Valley*. Justice Marshall had also indicated that *Marsh* was on shaky ground but the Court has not as yet taken the step of overruling it.

In its latest pronouncement on the state action issue, *Flagg Bros., Inc. v. Brooks*,[73] the Court addressed the public function question with Delphic clarity. It previously had noted that exclusivity is required for a function to be public,[74] but did not bother to explain why the electric utility in *Jackson v. Metropolitan Edison Co.*,[75] which was the functionally exclusive purveyor of electricity in Pennsylvania, was not performing a public function. And in virtually the same breath that it listed "such functions as education, fire and police protection, and tax collection"[76] as candidates for the public function appellation, the Court declined to decide the question one way or the other.[77] Judicial pronouncements such as this reach "the vanishing point where law does not exist, and must be brought into being, if at all, by an act of free creation."[78]

This cursory review has attempted to demonstrate that state action doctrine as developed by the Supreme Court "is a map whose every country is marked incognito."[79] Whether

69. 407 U.S. 551 (1972).
70. *Id.* at 562, 564. *See also* 391 U.S. at 320 n.9.
71. 407 U.S. at 571.
72. 424 U.S. 507 (1976).
73. 436 U.S. 149 (1978).
74. *Id.* at 159.
75. 419 U.S. 345 (1974).
76. 436 U.S. at 163.
77. *Id.* at 163-64.
78. B. CARDOZO, THE GROWTH OF THE LAW, 44 (1924).
79. Black, *supra* note 1, at 95.

more insight has been forthcoming from the scholarly community is a subject that remains next to be explored.

C. *The Various Academic Theories of State Action*

Although much has been written on the state action question,[80] the approaches can be easily categorized. Allowance must be made for differences in nuance, but, taking this into account, the debate has divided scholars into essentially two camps. First, there are those who take the view that there is something worth preserving in the state action requirement. This view has been denominated the traditionalist theory.[81] Second, there are those who would do away with the state action requirement entirely. This has been denominated the revisionist theory.[82]

1. The Traditionalist Theory

Traditionalist theory holds that the state action requirement, aside from its hoary origin in one of the first cases to construe the fourteenth amendment,[83] reflects values that are worth preserving in a modern context. Its function, broadly speaking, is to preserve a realm of private conduct within which the fourteenth amendment does not operate. It may seem strange indeed that we would wish to limit the operation of what has been called "the greatest law on earth."[84] But, at least according to two of the leading proponents of this theory, "This limitation is an express recognition of the role of the Constitution . . . ."[85]

The Constitution is seen, at least in its self-executing provisions,[86] as a charter of limitations upon "the arbitrary and capricious exercise of . . . governmental power . . . ."[87] Whereas originally such limitations were only thought necessary as against the federal government,[88] the Civil War and the tensions which caused it demonstrated the necessity of curbing the

80. For a chronological review of the state action literature, *see* Thompson, *supra* note 11, at 10-13.

81. *Id.* at 4.

82. *Id. See also* Black, *supra* note 1, at 84.

83. The Civil Rights Cases, 109 U.S. 3 (1883).

84. TRIBE, *supra* note 9, at 158.

85. Burke & Reber, *supra* note 3, at 1011.

86. *See* TRIBE, *supra* note 9, at 1147 n.1.

87. Burke & Reber, *supra* note 3, at 1013.

88. The Bill of Rights was originally held inapplicable to the states. Barron v. Mayor of Baltimore, 3 U.S. 464, 7 Pet. 243 (1833).

state governments as well. But it is only the leviathan of government which is seen as requiring such tight restraints. According to this view, the allocation of power between private individuals and their governments was not changed by the fourteenth amendment.

The state action requirement is also seen as insuring that the fourteenth amendment does not radically disrupt the balance of power between the federal and state governments.[89] The fourteenth amendment, it is asserted, was not intended to displace the states as the chief architects of private relationships. The federal government remains a government of enumerated powers ready to step in only when weighty national interests are at stake. To construe the fourteenth amendment as granting a roving commission to the federal government to interfere with private decisions is seen as inconsistent with the values of federalism.[90] The federal government must be limited as much as possible in its direct operation upon private individuals; if it acts at all, it can only act against states.[91]

At the same time, the state action limitation is seen as preserving a maximum of freedom to private individuals in the structuring of their relationships.[92] The states, unconstrained by such a limitation, are nevertheless trusted to interfere as little as possible with private decisionmaking. The federal government, on the other hand, is viewed with suspicion, as if every grant of power to it will make inroads into individual liberty. According to this argument an inverse relationship exists between federal power and private freedom. The state action limitation thus maximizes private freedom by minimizing federal power.

Other arguments adduced include the separation of powers argument[93] and the floodgates of litigation argument.[94] The separation of powers argument asserts, without explaining why, that Congress is more suited to act under the fourteenth

89. *See* Burke & Reber, *supra* note 3, at 1014-16. *See also* Van Alstyne & Karst, *supra* note 21, at 8.

90. *See* Younger v. Harris, 401 U.S. 37, 44-45 (1971).

91. The Civil Rights Cases, 109 U.S. 3, 11 (1883). For an example of how the federal government is constrained as well in its operation directly upon the states, *see* National League of Cities v. Usery, 426 U.S. 833 (1976).

92. Burke & Reber, *supra* note 3, at 1016-17.

93. *Id.* at 1017.

94. Thompson, *supra* note 11, at 29.

amendment mandate than is the Court. The floodgates of litigation argument however, is clearly an afterthought and should not be taken seriously.[95]

It is notable that even the traditionalists are incapable of formulating a consistent state action theory.[96] They content themselves with a description, necessarily lengthy and confusing,[97] of what the Supreme Court has done, and with prognostications as to the likely course of its future meanderings. Whether this is the best that can be done remains to be seen.

2. The Revisionist Theory

This approach takes due cognizance of the fact that the search for state action "has the flavor of a torchless search for a way out of a damp echoing cave."[98] The search is doomed to failure because what is being sought is really omnipresent. "State action is everywhere. This has always been the case, and becomes increasingly so as society grows more complex."[99] This undeniable verity is recognized even by the traditionalists: "State law in all of its forms thus has an enormous impact upon almost every form of private activities."[100] One is regulated by law when one travels to and from work,[101] when one is born,[102] and when one dies,[103] when one marries,[104] when one is divorced,[105] when one works,[106] plays,[107] eats,[108] drinks,[109] plans his

95. The argument is made in Friendly, *The Dartmouth College Case and the Public-Private Penumbra*, 12 TEX. L.Q. 1, 17-18 (1969). Judge Friendly himself is not convinced by the argument, for he is an advocate of the revisionist theory. This is as it should be. The floodgates of litigation argument, which has been interposed as a barrier in contexts as diverse as the abolition of interspousal immunity, *see* PROSSER, *supra* note 11, at 863 & n.46, and the imposition of liability for negligent infliction of emotional distress, *see* PROSSER, *supra* note 11, at 328 & n.36, appears to be no more than a last ditch effort to resist inevitable changes in the law. The argument has no substantive force whatsoever. It would be as logical to advocate that courts be closer on alternate Wednesdays and Fridays.

96. *See* Burke & Reber, *supra* note 3, at 1041.

97. A review of the state action cases comprises some two-thirds of the Burke & Reber article. *See* Burke & Reber, *supra* note 3, at 1041-1114.

98. Black, *supra* note 1, at 95.

99. Thompson, *supra* note 11, at 22.

100. Burke & Reber, *supra* note 3, at 1105.

101. *See, e.g.*, WIS. STAT. ch. 346 (1977).

102. *See, e.g.*, WIS. STAT. §§ 69.32, 146.01, 632.01 (1977).

103. *See, e.g.*, WIS. STAT. chs. 156-57 (1977).

104. *See, e.g.*, WIS. STAT. ch. 245 (1977).

105. *See, e.g.*, WIS. STAT. ch. 247 (1977).

106. *See, e.g.*, WIS. STAT. ch. 103 (1977).

107. *See, e.g.*, WIS. STAT. ch. 163 (1977).

investments,[110] trains for a livelihood[111] and cares for his health.[112] The law even regulates how one will be entertained in his home,[113] and invades the private precincts of the conjugal bed.[114] Against this background, it is almost laughable to even try and distinguish between state and private action.

Moreover, the state action requirement has been recognized as the last refuge of racists.[115] It all has the air of subterfuge about it, as the practice of racial discrimination is placed more and more into private hands only to have the Supreme Court catch up with the trick and frustrate the ruse. State action is a game of "hide the discrimination" which the racists were losing. Of course, the racists, it is true, have won a few rounds as of late,[116] but this may be explicable on other grounds than the cynical one that it is a new Supreme Court that is sitting.[117] And that premise certainly does nothing to reduce the sense of futility surrounding the search for a theory of state action.

The revisionists ask only for candor from the Court.[118] Since, they assert, it cannot be seriously contended that significant state involvement is missing in any case, decisions ostensibly bottomed on a finding of no state action must in reality reflect the presence of other values.[119] It would be far better for the Court to forthrightly state what those other values are than for it to hide behind the cloak of the state action doctrine.[120]

D. The Elusive Purposes Behind a State Action Requirement

The revisionist theory recognizes the importance of the values supposedly served by the state action requirement. They argue, however, that those values would be more adequately

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108. *See, e.g.*, WIS. STAT. ch. 97 (1977).

109. *See, e.g.*, WIS. STAT. ch. 196 (1977).

110. *See, e.g.*, WIS. STAT. ch. 71 (1977).

111. *See, e.g.*, WIS. STAT. chs. 115-21 (1977).

112. *See, e.g.*, WIS. STAT. chs. 140-49 (1977).

113. *See* 47 U.S.C. §§ 151-609 (1976).

114. *See, e.g.*, WIS. STAT. §§ 944.15-17 (1977). *But see* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

115. *See* Black, *supra* note 1, at 84-91.

116. Moose Lodge v. Irvis, 407 U.S. 163 (1972); Evans v. Abney, 396 U.S. 435 (1970).

117. It may reflect increasing deference to congressional responsibility under the Civil War amendments. *See* Burke & Reber, *supra* note 3, at 1018-20.

118. *See* Van Alstyne & Karst, *supra* note 21, at 58.

119. *Id.* at 7.

120. Thompson, *supra* note 11, at 29.

served if they were expressly recognized and dealt with in Court opinions rather than smothered beneath the surface of a formalistic inquiry into state-individual contacts which are inevitably present.

For example, the protection of individuals from arbitrary governmental power is certainly not inconsistent with the protection of individuals from the arbitrary exercise of heavily concentrated private power. This is seen as the true issue presented by a case such as *Jackson v. Metropolitan Edison Co.*,[121] an issue which was resolved by default by the invocation of the state action requirement.[122]

Nor is the value inherent in the private structuring of relationships really served by the state action doctrine.[123] Private relationships are already structured against a pervasive backdrop of law. What harm could possibly come from injecting the constitution into that backdrop? And, conjuring the spectre of federalism does nothing to answer the question of why, if the federal government can act directly upon the states, it cannot act upon the states in their relations with private individuals.[124]

But perhaps the most telling criticism of this "dialectic of purpose"[125] comes from Professor Tribe. After reviewing the concerns with the private structuring of relationships and federalism he observes: "Plainly, these purposes coexist only in tension. It is not possible to preserve maximum space simultaneously for individual choice and for state or congressional regulation: to the extent the states or Congress act, the space left to individual discretion is narrowed."[126] One might add that the same is ineluctibly true to the extent the states or Congress do not act. But the answer is not simply to expand "the space left to individual discretion." Even if that were done, hard choices would still have to be made. Understanding the nature of those choices, it is submitted, is the key to resolving the state action conundrum.

E. A Glimpse of What is Demanded of the Court

The term "interest" is defined in the *Restatement of Torts*

121. 419 U.S. 345 (1974).
122. *See* Thompson, *supra* note 11, at 23.
123. *Id.* at 25-27.
124. *Id.* at 24-25.
125. TRIBE, *supra* note 9, at 1149.
126. *Id.* at 1150.

(Second) as "the object of any human desire."[127] Interests fall broadly into two categories: those which are "legally protected,"[128] and those which are not. The decision as to which interests to clothe with legal protection is perhaps the most fundamental one for law to make. In an ideal world where interests never come in conflict there would be nothing for the law to protect, for the fulfillment of any interest would never require the sacrifice of any other. But we do not live in such a world. Interests come into conflict all the time and when the resulting dispute is pressed before a society's legal institutions the decision must be made as to which interests to sacrifice and which to protect.

It is in the nature of our constitutional system that only private individuals have interests deserving of legal protection. A government has no such interests[129] and can only legitimately assert the interests of those whom it represents.[130] Oftentimes the bona fides of a government in asserting those interests can be questioned. In those instances it is the province of the law to ferret out the legitimate public interests from those which are merely a cover for the interest of those in power in the expansion and perpetuation of that power.

This discussion should highlight the distinction between two types of disputes which are routinely pressed before a court of law for resolution. The distinction is not between cases in which a government is a party and those in which it is not.[131] The distinction, rather, is between cases in which private interests are directly in conflict and those in which the conflict of private interests is more attenuated. An illustration may be of some help.

Consider a simple neighborly dispute between Tenant *A* in an apartment building who has a penchant for playing the phonograph at full blast and Tenant *B* across the hall in the same apartment building lying in bed nursing a headache. Tenant *A* has an interest in listening to very loud music while Tenant *B* has an interest in peace and quiet. Which of the two the law will protect may depend on various circumstances; that

127. RESTATEMENT (SECOND) OF TORTS § 1 (1965).
128. *Id.*, Comment d.
129. *See* Van Alstyne & Karst, *supra* note 21, at 7.
130. *Id.* at 8.
131. *See* TRIBE, *supra* note 9, at 1124 n.7.

the two interests are in direct conflict seems plain enough.

Consider now the same Tenant *A* engaging in amorous activities without benefit of marriage with another individual in the bedroom of Tenant *A's* apartment. Tenant *B* learns of this and seeks to have their state's laws prohibiting such behavior enforced against Tenant *A*. A criminal prosecution is initiated against Tenant *A*. Tenant *A* has an interest in engaging in such activity. The state, however, as has been observed, has no legitimate interest of its own and is merely asserting the interest of people such as Tenant *B* in not having such activity take place. Whether the state is genuinely asserting that interest or is rather asserting its own interest in controlling the type of people who would engage in such activity is a question properly to be considered.

That it is not the party structure before the court which raises this question can be seen by varying the facts slightly. Assume that the state has enacted a law which provides that any person learning of the immoral activity of another may bring a civil action against that other and, upon establishing the immoral activity before the court, is entitled to recover personally from that other a $10,000 fine. Tenant *B* brings such an action. It is clear that the interests asserted have not changed; the only change is in the parties asserting them. Tenant *B* is still not asserting an interest which is only his as much as it is the interest of *all* people such as Tenant *B*.[132] Thus, if "Tenant *B*" is substituted for "state" in the question posed following the preceding hypothetical, that question is still properly to be considered.

The point of all this is that both in the type of case where private interests are directly in conflict and in the type of case where the conflict of private interests is more attenuated, the state clearly acts by deciding which interest to protect. However, by doing away entirely with the state action requirement in any form, both types of cases would have to be decided in the same way. In the case of a direct conflict between private

132. Thus the hypothetical presented should not be confused with class action suits, where the interests of each member of the class are severable. This is clearly true with respect to "spurious" class actions which are in reality no more than individual causes of action asserted simultaneously. It is no less true of "true" class actions, where the cause of action is held jointly by all the members of the class, because to the extent that the joint tenancy can be severed, the cause of action, and therefore the underlying interests, are severable. *See generally* Snyder v. Harris, 394 U.S. 332 (1969).

interests, to the extent that any or all of those interests could claim constitutional sanction, the conflict would have to be resolved by a court, and ultimately by the Supreme Court, by a process of constitutional adjudication. Whether that is necessarily desirable remains to be explored.

II. Factors to be Considered in Developing a State Action Theory

It is worth noting at the outset that the question of the value of a state action requirement, under the approach suggested, is the question of the value of separate treatment for the first of the types of cases dealt with in the preceding section, namely, those in which private interests are directly in conflict. The other type of cases, those in which the conflict of private interests is more attenuated, is distinguishable because cases of that type present the question of the bona fides of the interests asserted by one side. The level of scrutiny applied to the assertion of those interests is a central question of constitutional law and will not be dealt with here at any great length. It follows though that whatever level of scrutiny is applied to cases of the second type it is always proper.

It is also to be observed that when private interests are directly in conflict, the fact that one or more of those interests is sanctioned by the constitution does not require that those interests always supersede. The interests must still be weighed and balanced before the decision is made as to which to protect. For example, it is certainly true that one can be prosecuted for the crime of murder if one verbally orders the killing of another human being despite the fact that free speech is unqualifiedly protected by the constitution[133] while life is only protected against denial without due process of law.[134] Since in the type of cases under consideration the central task is to balance the interests in direct conflict, the question becomes who is to do the balancing.

A. The Origin of the State Action Requirement

The *fons et origo*[135] of the state action requirement is in the opinion of Justice Bradley in the *Civil Rights Cases.*[136] The

133. U.S. Const. amend. I.
134. *Id.* at amends. V; XIV, § 1.
135. Black, *supra* note 1, at 84.
136. 109 U.S. 3 (1883).

cases presented the question of whether Congress had the power under the fourteenth amendment to enact legislation guaranteeing the right to the enjoyment of public accommodations regardless of race. That the answer was a resounding no is well known. It is instructive, however, to examine some of the assumptions made by Justice Bradley in answering the question in that way. He stated:

> An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds ex directo to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. *It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment . . . .*[137]

Justice Bradley was expressing his faith in the institutions of state governments to adequately protect the interests of all of its citizens.[138] It was at least in part because of this faith that he felt that Congress had overstepped its bounds.

A number of inferences can thus be drawn from the above quoted language. First and most obviously, if congressional lack of power under the fourteenth amendment is predicated upon the assumption that the states will live up to their constitutional duties, then to the extent that the states neglect those duties congressional power is expanded.[139] That is precisely what happened during the 1960's when the Court removed many, if not all, restrictions on congressional power under section 5 of the fourteenth amendment. The zenith of this expansion was reached in *United States v. Guest*[140] where six justices of the Court expressed the opinion that Congress could reach private conduct regardless of state involvement. Congressional power under section 2 of the thirteenth amendment was simi-

137. *Id.* at 14 (emphasis added).
138. *See* Van Alstyne & Karst, *supra* note 21, at 5.
139. *See generally* Burke & Reber, *supra* note 3, at 1018-32.
140. 383 U.S. 745 (1966).

larly expansively construed in *Jones v. Alfred H. Mayer Co.*[141] where 42 U.S.C. § 1982 was held to reach private racial discrimination in the sale of housing.

The second inference to be drawn from Justice Bradley's language is that the states have an affirmative duty under the fourteenth amendment to prevent the invasions of "the personal rights of citizens" on the grounds of race. It is only when they have "the justest laws" that they discharge this duty. From such a perspective the Court's decision in *Reitman v. Mulkey*[142] seems almost compelled by the *Civil Rights Cases.*[143]

The third inference to be drawn is perhaps the most subtle. It is that the Court must interpret the Constitution with a view toward how well the states are functioning with regard to "respecting the rights of citizens." If a state has "the justest laws" it is not the business of the Court to intervene. Of course it can always be argued that the Court is the final arbiter of the justness of a state's laws.[144] That this is not always the case remains to be demonstrated.

B. The Proper Function of Judicial Review

It is not the intention here to join the debate as to the legitimacy of judicial review in general.[145] Judicial review has been with us since *Marbury v. Madison*[146] and there is no sign that it is about to go away. Moreover, judicial review is categorically proper in the type of case where the conflict of private interests is attenuated. As has been seen,[147] cases of that type are characterized by the fact that the bona fides of the representative assertion of generalized interests can be called into question. The possibility exists in those cases that the real interest being asserted is that of those in power in the expansion and perpetuation of that power. To the extent that there is a possibility that such an interest is being asserted by other institutions of government, "[i]t is emphatically the province and duty of the judicial department"[148] to apply the Constitu-

141. 392 U.S. 409 (1968).

142. 387 U.S. 369 (1967).

143. 109 U.S. 3 (1883).

144. *See, e.g.*, O. HOLMES, COLLECTED LEGAL PAPERS, 295-96 (1920).

145. *See generally* R. BERGER, CONGRESS V. THE SUPREME COURT (1969); A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

146. 5 U.S. 368, 1 Cranch 137 (1803).

147. *See* text accompanying notes 129-32 *supra.*

148. Marbury v. Madison, 5 U.S. 368, 389, 1 Cranch 137, 177 (1803).

tion so as to hold those other institutions in line. For if the Court will not do so, who will? Unchecked power is despotic power, and *someone* must provide the check.

The question this article addresses is whether the function of judicial review is more limited in the type of cases where private interests are directly in conflict. The answer to this question, it is submitted, can be found in Justice Stone's famous footnote four in *United States v. Carolene Products Co.*[149] That footnote reads in pertinent part:

> There may be narrower scope for operaton of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . .
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . .
>
> Nor need we enquire whether . . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[150]

This footnote is usually cited for the proposition that judicial scrutiny is at its highest level when rights guaranteed by the first ten amendments or suspect classifications are involved.[151] But this statement can be seen to stand for a more general proposition, namely that it is the sole function of judicial review to insure that the "political processes" designed by the framers serve to adequately reflect the will of the people. It is clear that when "discrete and insular minorities" are denied participation within these "political processes" those processes are incapable of adequately reflecting the will of the people, but reflect instead only the will of those fortunate enough not to be excluded. Full participation in this context

149. 304 U.S. 144 (1938).

150. *Id.* at 152 n.4.

151. *See generally* TRIBE, *supra* note 9, at 572-75.

means more than merely voting and running for office. It includes engaging in every aspect of social intercourse which is influenced by, and in turn influences, the outcome of those processes. A truly representative democracy requires no less.

And it is equally clear that the protection afforded the rights guaranteed by the first ten amendments serves the same function. The Bill of Rights is not a catalogue of every human interest worthy of protection. As has been pointed out[152] the right to life itself is not unconditionally guaranteed. The rights singled out for protection are those, and only those, necessary for the proper functioning of the political processes in the widest sense outlined above. Freedom of speech and of the press are protected to insure intelligent self-governance.[153] Freedom of religion and the prohibition against an establishment of religion exist to insure that the political arena is free from the corruption of religious sectarianism.[154] The protections afforded a criminally accused insure that the criminal justice apparatus not be abused for the suppression of political dissidents. Enough has been said, it is believed, to make the point.

The Court, then, is charged with the duty of making certain that the political machinery set up by the Constitution remains well-oiled. Once that is done, the Court must content itself with watching the machine work.

C. Limitations on Judicial Review

If "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[155] it is equally emphatically the province and duty of the legislative department to make the laws. As has been noted above,[156] a fundamental function of law is to decide which private interests to protect when private interests come in conflict. This is a peculiarly legislative function at least for reasons of institutional capacity, legitimacy and flexibility.

1. Institutional Capacity[157]

Any court, including the Supreme Court, acts in cases and

152. *See* text accompanying notes 133 & 134 *supra.*

153. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948); A. MEIKLEJOHN, POLITICAL FREEDOM (1965).

154. IX THE WRITINGS OF JAMES MADISON, 487 (G. Hung, ed. 1910).

155. Marbury v. Madison, 5 U.S. 368, 389 1 Cranch 137, 177 (1803).

156. *See* text accompanying notes 127 & 128 *supra.*

157. *See generally* Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L.J. 517 (1966).

controversies presented before it on the basis of a limited factual setting. It has no independent investigative apparatus. It cannot hold hearings or call witnesses except insofar as necessary to resolve the single controversy before it. The information which is made available to the court is presented in an adversarial context which may be productive of the truth as between the particular individuals before it but is not conducive to the resolution of broad issues of wide societal impact. A legislature, on the other hand, is bound by none of these constraints. If anyone must determine which of private interests directly in conflict is to be protected for the greater benefit of society, it is clear that a legislature is better suited to do so, and that such resolution is entitled to due deference from courts.

2. Legitimacy[158]

Even an elected judiciary, and particularly the federal judiciary which is appointed and whose members "hold their Offices during good Behaviour"[159] is not a representative political institution. As such, it is not and cannot be expected to be, as closely in touch with the will of the people as are representative legislatures. The Court in particular is relied upon for the pronouncement of the fundamental principles by which society is to be governed. It draws its strength from the text of the Constitution.[160] To the extent that it is perceived as departing from the clear mandate of that text, its strength is sapped. When the Court is engaged in deciding whether constitutional values which have come into direct conflict with other values are to be protected, it is making a decision which is not mandated by the Constitution. If the decision it makes is out of touch with the values shared by society-at-large, the Court is in danger of losing the respect of the people. It loses the strength that it needs to perform the function perceived as primary, namely the pronouncement of fundamental principles.

3. Flexibility[161]

The adjudicatory process, at least in common-law systems, operates under the principle of stare decisis. A decision once

158. *See generally* A. Cox, The Role of the Supreme Court in American Government, 99-118 (1976).

159. U.S. Const. art. III, § 1.

160. *See* Tribe, *supra* note 9, at 48.

161. *See generally* Levi, *An Introduction to Legal Reasoning,* 15 Chi. L. Rev. 501, 541-72 (1948).

made is expected to be followed, even if it was a bad one. This is singularly true of constitutional adjudication, where "satellite concepts"[162] developed by the Court are treated as if part of the Constitution itself. Bad decisions are overruled with difficulty. It took a Civil War to overrule *Scott v. Sanford*.[163] It took the sixteenth amendment to overrule *Pollock v. Farmers' Loan & Trust Co.*[164] It took fifty-eight years for *Plessy v. Ferguson*[165] to be overruled. Freezing a particular result of a balancing of interests into the realm of constitutional adjudication would appear undesirable unless necessary.

A legislature on the other hand can repeal laws as freely as it passes them. If a piece of legislation appears unwise a properly functioning political process can be relied upon to secure its prompt repeal.[166] Moreover, particular laws enacted by a legislature need not be doctrinally consistent. A legislature can decide to favor one interest in one area and a conflicting interest in another area without even being expected to provide a doctrinal rationale.[167] Societal values are invariably in flux and must be balanced with great sensitivity. This also is a task to which a legislature is better suited than a court.

D. The Place of Constitutional Common Law[168]

Necessarily the Court cannot be restricted to textual exegesis of the Constitution. For one thing, as has been pointed out,[169] all of the institutional considerations canvassed above are outweighed by the need for a forum to judge the bona fides of purported representative governmental assertions of generalized private interests. For another, the notion that in the face of legislative silence it is entirely proper for courts to evolve a body of decisional law in the course of adjudicating cases brought before them has been part of our jurisprudence since it first developed in twelfth century England. The course of constitutional adjudication is no different.

Constitutional common law has been described as "a sub-

162. *Id.* at 506.
163. 60 U.S. (10 How.) 393 (1857).
164. 158 U.S. 601 (1895).
165. 163 U.S. 537 (1896).
166. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
167. *See* TRIBE, *supra* note 9, at 269.
168. *See generally* Monaghan, *Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) [hereinafter cited as Monaghan].
169. *See* text accompanying notes 144-47 *supra*.

structure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification or even reversal by Congress."[170] Since it does not fit the paradigm of core constitutional adjudication, and is essentially legislative in character,[171] it follows that such common law as developed by the Court must bow to the express pronouncement of Congress. It is even asserted that, at least in areas other than those of exclusively national concern,[172] such common law is subject to being overruled, directly or indirectly, by the states.[173] The reasons given for this general legislative superiority are similar to those discussed above.[174]

It would seem, then, that the proper role for the Court in the process of balancing private interests in direct conflict is a common-law one.[175] The results of such a balancing process would draw "their inspiration and authority from, but (would) not (be) required by" the Constitution. Moreover, they would be "subject to . . . reversal" by the express pronouncements of truly representative legislatures, both state and federal, reflecting the superior institutional competence of such bodies in this area.

III. State Action as Abstentionism

A. *The Role of the Court Vis-a-Vis the Legislature*

Against this background it can be readily seen that the state action requirement is indeed an abstentionist doctrine,[176] invoked by the Court when asked to weigh private interests in direct conflict in the face of a decision on that score by a truly representative legislature. Such abstention, far from being an abdication of judicial responsibility, reflects legitimate institutional concerns and is motivated by a due deference to the legislative function. As such, it is required by notions both of the separation of powers and of federalism.

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170. Monaghan, *supra* note 168, at 2-3.

171. *Id.* at 23.

172. *Id.* at 10-17.

173. *Id.* at 34-38.

174. *Id.* at 28-29.

175. *See* Tribe, *supra* note 9, at 296 & n.40.

176. The state action requirement was so described, somewhat perjoratively in Thompson, *supra* note 11, at 22.

When presented with the same type of question of the balance to be struck between private interests in direct conflict, but in the face of legislative silence, the Court's role is changed because there is nothing to which it must defer. Then the Court's role becomes the ancient one of the creator of common law.

If the Court is not faced by legislative silence but perceives that the pronouncement came from a legislature which is not truly representative, one in which due regard was not accorded to all of the interests involved, the Court's role shifts again. It is then that the Court dons the weighty mantle of *Marbury v. Madison*[177] to effect the framers' intent for the functioning of the political processes they engineered.

B. A Tentative Approach to State Action Analysis

The central determination the Court must make when presented with a case of private interests in direct conflict is, then, whether those interests have already been balanced by a properly functioning political process. This threshold inquiry does not undertake to balance those interests but rather seeks to ascertain whether the balance which has already been struck is truly representative. A method of analysis designed to arrive at such a determination would ask the following questions:

1. Whose Interests Are Implicated?

It must obviously first be ascertained whether the case presents a situation where private interests are in direct conflict. If the state is a party to the action, this does not assure that the case is one of the second category. It must still be determined if the state is the "real party in interest." If the state is not a party it must still be determined if the parties to the action are truly asserting their own interests rather than generalized interests in an attenuated representative capacity. Existing standing requirements may be helpful in making this determination but are not conclusive.[178]

177. 5 U.S. 368, 1 Cranch 137 (1803).

178. This is because "surrogate" standing may be found even though constitutional rights are asserted in a representative capacity. The decision to grant representational standing is based, *inter alia,* upon a finding that the rights asserted will be adequately advocated before the Court. On the other hand, a finding of no state action as here understood requires, *inter alia,* that the personal interests of the parties before the Court be in direct conflict. This involves an entirely different showing. For a general discussion of representational standing and the factors considered in granting it, *see*

Once this problem is solved the interests asserted must be identified with a view toward solving the ultimate problem, that of whether those interests have been fairly represented. Interests do not participate in the political process, people do. As such, the nexus between the interest asserted and the person asserting it must be established. It may here be observed that this problem reduces to the familiar one in legal analysis, that of classifying legal relationships. The conflicting interests will probably fall into one of the familiar relational patterns, such as creditor-debtor, landlord-tenant, vendor-vendee and tortfeasor-victim. The relational classification may have to be further narrowed, however; for example, tortfeasor-victim may have to be more precisely categorized as discriminator-victim of racial discrimination.

2. Has the Legislature Spoken?

The next question must clearly be asked because if the answer is no the Court must necessarily proceed to the merits. This is true even if state decisional law has balanced the interests, because whatever reasons there are for deference to legislatures, those reasons do not require deference to courts. The *Younger v. Harris*[179] doctrine would apply only to the timing of the federal action. The adequate and independent state grounds doctrine[180] would be implicated if the constitutional relief sought were denied for reasons such as waiver[181] or laches, but not if the state court decision proceeded to the merits nor if the state grounds were found not to be fair and substantial.[182] These doctrines have nothing to do with the state action requirement, but rest on independent bases. The analysis here presented squares quite well with *Shelley v. Kraemer,*[183] a decision which has generally troubled the commentators.[184] According to the instant approach the situation presented in *Shelley*

Note, *Standing to Assert Constitutional Jus Tertii,* 88 HARV. L. REV. 423 (1974). *See also* TRIBE, *supra* note 9, at 100-14.

179. 401 U.S. 37 (1971). *See* Fuentes v. Shevin, 407 U.S. 67, 98-99 (1972) (White, J., dissenting). *See generally* TRIBE, *supra* note 9, at 152-56.

180. Fox Film Corp. v. Muller, 296 U.S. 207, 209-10 (1935). *See generally* TRIBE, *supra* note 9, at 120-29.

181. *See* Fuentes v. Shevin, 407 U.S. 67, 102-03 (1972) (White, J., dissenting).

182. Lawrence v. State Tax Comm'n of Miss., 286 U.S. 276, 282 (1932).

183. 334 U.S. 1 (1948).

184. *See, e.g.,* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 29-30 (1959).

would require a finding of state action because it was a common-law rule which was invoked to balance the interests and no special deference is owed such interpretation by the Court. Common law, far from being a shield for state action,[185] is especially susceptible to nullification on that ground.

For the legislature to be considered to have spoken it is not required that it have addressed the particular issue in question. It is enough for the legislature to have enacted a comprehensive scheme covering the entire area from which it can be inferred that all aspects of the area were intended to be covered. This is, of course, a matter of degree, but it involves no more than the familiar search for legislative intent. The question thus reduces to one of whether the legislature intended to resolve the particular issue in dispute. In this regard, the construction placed upon the state legislation by the highest court of the state is, of course, binding on the Supreme Court.[186]

3. Are Those Interests Fairly Represented?

The resolution of this question is at the heart of the inquiry. Once the particular interest holders have been identified it is an easy matter to ascertain whether they are full participants in the political process. If discrete and insular minorities are involved, that does not end the inquiry but shifts it to one of determining whether the member of the minority is being excluded to any significant extent from full participation in the political process. This explains both *Moose Lodge v. Irvis*[187] and *Evans v. Abney.*[188] In *Moose Lodge* a black was excluded from service in a private club.[189] Without undertaking to balance his interest in being served against the directly conflicting one of the Moose lodge in excluding him, the Court could readily determine that the affront did not limit his participation in an aspect of social intercourse which influences the political process. Similarly, in *Abney* the park was closed to both races so that the aspect of social intercourse from which blacks were

185. *See* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330 (9th Cir. 1974), *cert. denied,* 419 U.S. 1006 (1974).

186. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

187. 407 U.S. 163 (1972).

188. 396 U.S. 435 (1970).

189. It is noteworthy that even Professor Black, whose exhortations to the Court on the subject of the elimination of racial discrimination cannot be paralled in eloquence, indicated that he would have come to the same result on these facts. *See* Black, *supra* note 1, at 101.

excluded was one from which whites were also excluded.

If the denial of rights secured by the first ten amendments is implicated, the inquiry becomes whether the values of insuring effective political participation served by those rights are affected. This explains *Lloyd Corp., Ltd. v. Tanner* [190] and *Hudgens v. NLRB*[191] and in particular serves to explain the following anomaly presented by the first amendment analysis in those cases: Whereas the least restrictive means test is usually applied to the denial of the right to free speech in instances where the private interests in conflict are attenuated, in these cases that test was applied instead to the right to free speech itself. Under the suggested analysis, the problem is resolved when it is borne in mind that the relevant inquiry is whether the value of effective political participation served by the right of free speech is threatened by the conflicting interest. The Court seems to have found that the demonstrations could effectively be held on the nearby public sidewalks and thus concluded that the relevant value was not threatened.

The end point of the entire inquiry is a determination of whether the conflicting interests were adequately reflected in the legislative decision to strike the balance between them where it did. If the answer to this question is yes, the analysis proceeds no further. State action in the relevant sense—denial by the state of the right asserted by the complaining party—is missing. The right has not been denied; it has been balanced out, in full accordance with the framers' intent, by the working of the political processes which they established.

IV. An Application to Self-Help Repossession

We return full circle to the inquiry with which this comment began, that of whether U.C.C. § 9-503 violates due process of law. It will become clear, first of all, that there is no relevant distinction between sections 9-503 and 7-210 so that, depending on the outcome of this analysis, *Flagg Bros. Inc. v. Brooks*[192] was either rightly or wrongly decided. It will also, interestingly enough, become clear that there is no relevant distinction between U.C.C. § 9-503 and statutory replevin[193] or

190. 407 U.S. 551 (1972).

191. *See generally* Tribe, *supra* note 9, at 682-88.

192. 436 U.S. 149 (1978).

193. *See* Fuentes v. Shevin, 407 U.S. 67, 103 (1972) (White, J., dissenting). Or garnishment. *See* Sniadach v. Family Finance Corp., 395 U.S. 337, 344-45 (1969) (Black, J., dissenting).

sequestration so that, also depending upon the outcome of this analysis, precedential effect is to be given to either *Fuentes v. Shevin*[194] or *Mitchell v. W.T. Grant Co.*[195]

1. Whose Interests are Implicated?

It is clear that, regardless of the party structure, the conflicting interests are on the one hand, those of the creditor in retrieving the collateral upon default, and on the other hand, those of the debtor in maintaining possession of the collateral. This is a paradigm case of private interests in direct conflict and thus, broadly speaking, under this analysis, the sole inquiry becomes, whether the interests involved are fairly represented in the political process which chose to balance them as it did.

Identification of the interests asserted and establishment of the nexus between each one of them and the person asserting it are simple matters. The conflicting interests fall into the familiar relational pattern of secured creditor-debtor. If a consumer is involved the classification can be further narrowed to that of purchase money secured creditor-consumer debtor.

2. Has the Legislature Spoken?

Although the right to self-help repossession was originally a matter of common law, a point which, far from compelling a finding of no state action[196] would, if anything, militate toward a finding of state action, the point is actually of no significance whatsoever.[197] The enactment into statutory law is a legislative judgment which requires deference from the Court. Since the legislation in question clearly deals with the precise issue in express words,[198] there is no doubt that the legislature has spoken.

3. Are those Interests Fairly Represented?

The question now becomes whether the interest holders are full participants in the political process which resulted in the enactment of the U.C.C. into law. There is no reason to suppose

194. 407 U.S. 67 (1972).

195. 416 U.S. 600 (1974).

196. *See* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330 (9th Cir. 1974), *cert. denied,* 419 U.S. 1006 (1974).

197. A point which did not escape Justice Rehnquist in *Flagg. See* 436 U.S. at 162 & n.13.

198. *See* note 11 *supra.*

that the creditor class has been in any way excluded from full participation in the political process. The inquiry thus focuses upon the debtor class. The first query to be posed is whether the debtor class can in any way be classified as a discrete and insular minority.

Certainly the general class in debtors is in no way limited to poor debtors, but includes rich debtors as well. The particular debtor challenging the constitutionality of U.C.C. § 9-503 could as easily be an operator of an automobile dealership as a ghetto-dwelling consumer. The inquiry becomes more focused, however, if we assume that the debtor is an impecunious consumer.

As has been alluded to earlier[199] a number of recent cases decided by the Court[200] whether rightly or wrongly, establish that wealth is not treated as a suspect classification. This presupposes that, for purposes of constitutional law, the poor do not constitute a discrete and insular minority, cut off from full participation in the political process. In this instance, such a conclusion might be reinforced by noting that in one state[201] the right to self-help repossession does not exist and in Wisconsin[202] it does not exist with respect to collateral held by a consumer debtor. In those instances it does appear that the political process was receptive to the interest of the consumer class in the abolition of self-help repossession. Furthermore, U.C.C. § 9-503 itself contains a breach of the peace limitation, reflecting the fact that some interests of consumers were taken into consideration.[203]

It next remains to be determined whether any rights secured by the first ten amendments are implicated. The debtor's right to be free from a denial of property without due process of law is involved, but the same can be said for the creditor.[204]

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199. *See* text accompanying notes 47-49 *supra.*

200. *See, e.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); James v. Valtierra, 402 U.S. 137 (1971). This is precisely the point that can be understood as troubling Justice Marshall in his dissenting opinion in *Flagg. See* 436 U.S. at 166-67 (1978).

201. Louisiana. *See* note 9 *supra.*

202. WIS. STAT. § 425.206 (1977).

203. *See* White, *supra* note 7, at 525-26.

204. *See* Fuentes v. Shevin, 407 U.S. 67, 102 (1972) (White, J., dissenting). *See also* Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession,* 2 HAST. CONST. L.Q. 893, 930 & n.97 (1975).

More on point is the inquiry as to whether the denial to the debtor of that right will preclude him from full participation in all aspects of social intercourse which influence the outcome of the political process. If the collateral is an automobile it may well have that effect although the debtor is still not precluded from using public transportation. If it is a television[205] it will certainly cut down on the level of speech to which he is exposed. But the determinative factor is that the recognition of the creditor's right to self-help repossession will not affect the debtor to any significantly greater extent than he would be affected were the television repossessed after a full hearing on the merits. He may lose the use of the television for a month or so,[206] but it is difficult to contend that a month's worth of television would make the debtor any more capable of intelligent self-governance.

It is clear that most of these objections are spurious. They have been discussed in order to demonstrate that the analysis produces the same result no matter how hard one attempts to press it to the point of absurdity: U.C.C. § 9-503 is clearly constitutional because of the absence of state action in the relevant sense.

V. Conclusion

It should be obvious that conspicuously absent from the analytical method outlined above was any attempt to deal with the substantive merits of the question of whether self-help repossession denies the debtor whose collateral is repossessed property without due process of law. Since the debtor's interests are not the only ones involved, but rather come into direct conflict with the legitimate interests of the creditor, any decision on the merits would be forced to balance these interests rather than simply make a pronouncement as to the meaning of a constitutional provision. The essence of the point which this comment has attempted to make is that if those interests have already been balanced by the outcome of an optimally

205. The breach of the peace limitation should assure, in any event, that a consumer's private television will not be the subject of self-help repossession. That limitation has the practical effect of limiting that remedy virtually exclusively to automobiles. *See* White, *supra* note 7, at 513. Thus, no debtor need fear that his television will be repossessed by self-help, right in the middle of watching his favorite television program.

206. For estimates of the amount of time involved, *id.* at 518.

functioning political process, then, from the Court's point of view, that is the end of the matter. In instances involving only direct conflict between two private interests, the sole function of the Court is to ascertain whether the political process is indeed functioning as intended. This requires nothing more than finding: (1) That the balancing was the outcome of a political process in which all of the interests involved were fully and fairly represented; and (2) That the result produced will enable those interests to continue to be fully and fairly represented.

If this second point has not been adequately emphasized heretofore, now is the time to press it since it follows from the fact that an optimally functioning political process can produce bad results as easily as it can produce good ones. The "machine" is not a computer, but is rather a system of human institutions with all the error, uncertainty and tentativeness that implies. As long as "those political processes . . . can . . . be expected to bring about repeal of undesirable legislation,"[207] such repeal must be left to their operation. This requires no more than a determination that none of the interests involved has been in any way impaired from further pressing its point in the political arena.

As long as this is the case the defeated interests can take heart from the fact that change is inevitable. As Heraclitus observed, no one swims in the same river twice, whereupon one of his more perceptive disciples added, or even once.

Apparently, then, the message the Court is conveying in *Flagg* is that if one objects to a creditors' remedy the course to pursue lies in the utilization of the political process. The extreme deference accorded to the legislative function makes it unlikely that an appeal to the judicary would be successful.

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207. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).